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Supreme Court, U.S.
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No. 06-1285

In The Supreme Court of the United States

Christopher Mensah Dekoladenu
PETITIONER

v.

Alberto R. Gonzales, Attorney General
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY FOR PETITIONER

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INTRODUCTION

This case considers whether the majority of United States Courts of Appeal are correct in holding that a timely filed motion to reopen tolls an alien's voluntary departure period pending its adjudication.

ARGUMENT IN REPLY

The petition for a writ of certiorari should be granted despite the Government's arguments to the contrary because the circuit split on the issue presented has thoroughly percolated below. Furthermore, the minority position held by

the fourth and fifth circuits has no basis in law and must be corrected to establish uniformity in our immigration laws.

I. The Circuit Split Must Be Resolved

Although the Government acknowledges the well-established circuit split below, Resp. Opp. at 14, and that the case *sub judice* is a relatively suitable vehicle for its resolution, Resp. Opp. to *Mc rani v. Gonzales*, No. 06-610 (petition filed Oct. 31, 2006), at 22, it nevertheless argues that review is unwarranted. In support thereof, the Government points to several contingencies which it argues would render intervention inappropriate.

First, the Government points to the possibility that the Department of Justice might promulgate regulations addressing the issue presented. Resp. Opp. at 14-15. As the Petitioner previously pointed out, Pet. 19-20, however, the prospect of such regulations is doubtful given that the Department promised to address the issue more than a decade ago. Furthermore, *even if* such regulations were forthcoming, they would be inapplicable to aliens facing removal proceedings in the third, eight, ninth and eleventh circuits,[1] whose courts have already held that the Government's interpretation of the tolling issue is "absurd" and contrary to the clearly expressed intention of Congress.[2] Awaiting the

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[1] *Kanivets v. Gonzales*, 424 F.3d 330 (3rd Cir. 2005); *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005); *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005); *Ugokwe v. United States AG*, 453 F.3d 1325 (11th Cir. 2006).

[2] *See National Cable & Telecomms. Ass'n v. Brand X Internet. Servs.*, 545 U.S. 967 (2005) (holding that a court's prior judicial construction of a statute will trump an agency's construction otherwise entitled to *Chevron* deference if the court holds that the

creation of a patchwork system of immigration law, which lays one rule for California, Arizona, and Florida, and another for Texas, Louisiana, and Maryland, makes little sense.

Second, the Government noted in its response filed on June 22, 2007 that comprehensive immigration reform is under active consideration by Congress. Resp. Opp. at 15. As this Court is likely aware, however, the immigration bill in the Senate failed on June 28, 2007, which commentators believe has little prospect of being revived. Robert Pear and Carl Hulse, *Immigrant Bill Dies in Senate; Defeat for Bush*, NEW YORK TIMES, June 29, 2007.

Finally, the Government adds in a footnote that "we have been informed that the tolling issue has been raised in a number of cases pending before the BIA." Resp. Opp. at 15. While this is undoubtedly true, the BIA has consistently and inappropriately[3] dodged the tolling issue since at least October 28, 2002, when it denied the motion to reopen at issue in *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005) in a non-precedential, one-board member opinion. There are no new indications that the BIA now has the desire to publish on an issue that it has been given every reasonable opportunity to reach.[4]

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judicial construction follows from the unambiguous terms of the statute).

[3] *See* Pet. at 13-14 (describing the BIA's refusal to follow federal regulations and internal policy which *require* it to refer cases presenting the need to establish precedent or the need to resolve cases of major national import to three-member panels who may resolve the issue in precedential fashion).

[4] *See also Matter of Zmijewska*, 24 I&N Dec. 87, 93 n.3 (BIA 2007) (3-member panel of BIA, in a precedential opinion authored on February 21, 2007, noting current circuit split but *declining to*

Given that the contingencies offered by the Government are unsatisfying, this Court's intervention is clearly appropriate to resolve a well-developed, four-two circuit split.

II. The Government's Arguments on the Merits are Unpersuasive

On the merits, the Government argues in favor of the minority position of the fourth and fifth circuits. A large portion of its analysis rehashes the two main reasons cited by the fourth circuit for refusing to recognize tolling of the voluntary departure period.

First, the Government argues that tolling cannot be allowed because the voluntary departure provision is more specific than the motion to reopen statute, and under the canon of statutory construction which requires that a specific provision will control a more general one, the voluntary departure statue must govern. Resp. Opp. at 10. The Petitioner need not further address this reasoning, as it has already done so in its petition–the specific-controls-the-general canon is inapplicable, Pet. at 15-16, and even if applicable, cuts the opposite direction, Pet. at 16-17.

Second, the Government repeats the fourth circuit's contention that tolling is impermissible because it would render the time limits for voluntary departure meaningless. Resp. Opp. at 12. The Petitioner has also previously addressed this argument–tolling does not render meaningless time limits because the very idea of tolling is to stop a limitations period from running. Pet. at 17-18.

In addition to these previously discussed issues,

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consider it or even acknowledge its practice of resolving the issue via non-precedential, single board member opinions).

however, the Government relies on *Stone v. INS*, 514 U.S. 386 (1995), a case not cited by either the fourth or fifth circuits. Resp. Opp. at 11. The Government argues that *Stone* strongly supports the result reached below in the present case based on a simple syllogism. *Id.* Given that *Stone* held that a motion for reconsideration does not toll the period to seek judicial review of a deportation order, and because a voluntary departure order is simply an alternative to a deportation order, it follows that a motion to reopen likewise does not toll a voluntary departure period. *Id.* at 11-12. The Government misreads *Stone* and its syllogism is unpersuasive.

In *Stone*, this Court considered the effect of the filing of a motion to reconsider a deportation order on the "finality" of that deportation order for purposes of the then-existing ninety day period to petition for judicial review. *Stone, supra*, at 390. While the alien argued that his motion to reconsider rendered his original deportation order nonfinal, the Government argued that the judicial review period was unaffected by the motion. *Id.*

Parsing these arguments, this Court held that the Immigration and Nationality Act (via incorporation of the background procedural rules of the Hobbs Act) embraces a *default tolling rule*. *Id.* at 391-94. However, in the context of the nexus between motions to reconsider and the judicial review period, Congress "chose to depart from ordinary judicial treatment of agency orders . . ." *Id.* at 393.[5] It was only the limited case of a "Hobson's choice" which forced this Court to permit exception to the normal tolling rule. *Id.* at 398.

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[5] Specifically, by creation of a dual system of petitions for review of BIA decisions, in which an alien is permitted to review *both* an original deportation order and the denial of a motion to reconsider of that denial, the conclusion was inescapable that a motion to reconsider could not toll or render an original deportation order "nonfinal" for the purposes of the judicial review period.

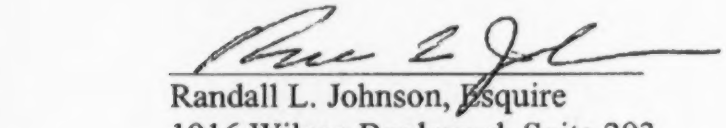
In the case at hand, there is no legislative intent to depart from the default tolling rule which this Court affirmatively recognized as applicable to immigration law in *Stone*. Therefore, the Government's citation of *Stone* for the proposition that tolling is generally inapplicable in the context of motions in immigration law is incorrect. In fact, *Stone* stands for the exact opposition proposition, and must be read as an additional reason in favor of adopting a tolling position in the present case.

Given that each of the Government's arguments are unpersuasive, and the depth of the Petitioner's affirmative arguments for relief, Pet. 6-20, the former is wrong on the merits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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